Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

RICHARD KAGAN,

Petitioner,

v.

THOMAS ROTH, Warden,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether certiorari should be granted, the judgment below vacated and the case remanded for reconsideration in light of the impacting intervening decisions in *Slack v. McDaniel*, 529 U.S. ___, 120 S.Ct. 1595 (2000) (Kennedy, J.), *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1495 (2000) (O'Connor, J.) and *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1479 (2000) (Kennedy, J.)?

2. Whether the failure to observe procedures designed to protect the petitioner's right not to be tried or convicted while incompetent to stand trial, deprived petitioner of his Fifth and Fourteenth Amendment Due Process Clause rights to a fair trial, and his Sixth Amendment right to [the] assistance of counsel in his defense?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court.

Richard Kagan (hereafter petitioner) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 17, 2000.

OPINION BELOW

The memorandum order of the United States Court of Appeals for the Seventh Circuit, denying petitioner's request for a Certificate of Appealability (hereafter COA), was filed on March 17, 2000 (App. 1, *infra*). The district court's unpublished opinion and judgment denying relief pursuant to 28 U.S.C. § 2254 was filed on June 23, 1999 and is reproduced at App. 2-14, *infra*. The district court denied petitioner's request for a COA on August 12, 1999 (App. 15-17, *infra*).

JURISDICTION

The memorandum order denying petitioner's request for a COA was issued by a panel of the United States Court of Appeals for the Seventh Circuit on March 17, 2000 (App. 1, *infra*). No petition for rehearing was submitted. This petition for writ of certiorari follows within ninety days, and this Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1).

CONSTITUTION AND STATUTES INVOLVED

The United States Constitution, Fifth Amendment, in pertinent part provides:

> No person shall be . . . [nor] be deprived of life, liberty or property, without due process of law . . .

The United States Constitution, Sixth Amendment in pertinent part, provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . and to have the assistance of counsel for his defense.

The United States Constitution, Fourteenth Amendment, in pertinent part provides:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2253, in pertinent part, provides:

> **§ 2253.** Appeal
>
> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall he subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or . . .

> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right . . .

28 U.S.C. § 2254(d)(1) states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(e)(2), in pertinent part, states:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule on constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

In 1994 the Illinois Criminal Code, 725 ILCS 5/104-10 provided:

> A defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him *or to assist in his defense*. 725 ILCS 5/104-10 (ital. emph. added)

Further, under 725 ILCS 5/104-13(b) if the fitness issue involves defendant's physical condition

> ". . . the court *shall appoint one or more physicians and in addition, such other experts as it may deem appropriate to examine the defendant and to report to the court regarding the defendant's condition*" (ital. emph. added).

STATEMENT

The decision below raises serious questions regarding the right of an Illinois citizen to remain trial-free pending a reasonable opportunity to assist in preparing his defense. For several months prior to trial, petitioner's cardiac physicians had made arrangements for his cardiac surgery. Awaiting that surgery, petitioner was arrested and charged with, *inter alia*, attempt first-degree murder. Pending trial he was compelled to ingest a medley of life-support coronary medications. The trial court ruled that 40/60 percent artery blockages rose [only] to the level of elective surgery. On July 6, 1994, two weeks before petitioner's attempt first-degree murder trial, the trial court denied a trial adjournment, stating:

> It is my order that Mr. Kagan not have any elective surgery prior to the date of trial unless he first is granted permission by the court, so I am denying the motion.

Tr. of 7/6/94 at pp. 27-28.

On both July 14 and 21, 1994, the trial court denied permission for petitioner to undergo cardiac surgery. Trial commenced on July 21, 1994.

1. **Pretrial, Trial and Direct Appeal.**

Petitioner is a 54 year old former Illinois attorney, serving a thirty-year sentence in the Illinois Department of Corrections following his 1994 Lake County, Illinois jury conviction for soliciting the attempt murder of his former spouse.

During April 1994, petitioner was in an Evanston, Illinois hospital for coronary-related difficulties. He was scheduled to have cardiac surgery at the Arizona Heart Institute during May 1994. On April 28, 1994, petitioner was arrested and charged by information with soliciting the murder of his spouse (C. 1, 3; C refers to orig. rec.). On May 4, 1994, a Lake County, Illinois grand jury returned a three-count indictment charging petitioner with solicitation to commit murder for hire, conspiracy to commit first-degree murder and attempt first-degree murder (C. 5-8).

Petitioner's cardiovascular condition was brought to the trial court's attention as early as May 13, 1994 by virtue of a written motion to reduce the $1,000,000 bail. *Inter alia*, the May 13, 1994 motion recited:

> Mr. Kagan was stricken with a cerebral aneurysm in 1988, which required that a metal shunt and a clip be permanently implanted in his head and a filter implanted in his artery through the groin.
>
> Additionally, he has recently been diagnosed with angina pectoris, a cardiovascular condition,

> which requires immediate attention in the form of surgery. Mr. Kagan is on life support medication at this time. Because of his health, he is in a life-threatening situation, which is deteriorating, and which has deteriorated since his incarceration on his arrest in this case. Because of his medical condition, Mr. Kagan has been unable to assist in the preparation of his defense. When counsel met with Mr. Kagan at the jail on May 2, 1994, the meeting had to be discontinued because the stress of the discussions brought on a seizure. Copies of Mr. Kagan's medical records are attached as Exhibit A. At the time of his arrest, Mr. Kagan had been scheduled for heart surgery at the Arizona Heart Institute in Phoenix, Arizona. The defense is prepared to present the testimony of Mr. Kagan's treating physician should the court wish to hear live testimony regarding Mr. Kagan's condition and prognosis. (C. 14-15)

After petitioner was released pending trial, he sought to expand the conditions of bail to allow him to travel to Arizona for cardiovascular surgery (C. 91). In part, his June 1, 1994 filing asserted [that] ". . . Mr. Kagan has been and will be unable to assist in the preparation of his defense" [because of his deteriorating condition] (App. 18-19, *infra*).

On June 16, 1994, the trial court was advised by the petitioner that he was awaiting surgery scheduling to clear two artery blockages to his heart and he has not been able to assist in the preparation of his defense (Tr. of 6/16/94 at Tr. 58). The trial court denied medically related travel and trial continuance requests (*Id.* at Tr. 79).

On July 6, 1994, defense counsel brought to the attention of the trial court that petitioner was still attempting to schedule coronary surgery in the Chicago area ". . . because he really has not been able to fully participate in preparing for trial" (Tr. of 7/6/94 at Tr. 25). Defense counsel went on to direct the court's attention that the contemplated coronary surgery was open heart bypass surgery because less invasive coronary treatment was unavailable based on petitioner's deteriorating kidney condition (Tr. of 7/6/94 at Tr. 26-27). The trial court acknowledged awareness of petitioner's coronary condition, noting, in part, that petitioner has a forty-sixty percent blockage in two veins, but there is no testimony that the blockage requires immediate surgery (*Id.* at Tr. 27). The trial court, while denying a trial continuance, noted:

> It is my order that Mr. Kagan not have any elective surgery prior to the date of trial unless he first is granted permission by the court, so I am denying the motion.

Id. at Tr. 27-28.

On July 14, 1994, approximately a week in advance of trial, petitioner's counsel again sought an adjournment of the trial date (Orig. Rec. C. 116; App. 20-23, *infra*). The continuance motion noted that petitioner had been under the constant care of physicians for his coronary condition since before his April 28, 1994 arrest and because of petitioner's coronary condition, he has been unable to assist his attorney in the preparation of his defense because of chest pains and the need for nitroglycerin tablets. In defense counsel's verified submission, she asserted that petitioner's inability to assist in defense preparation was such that she could not pur-

sue an aggressive and effective defense when defendant is not competent to assist counsel in the preparation of that defense (App. 20-22, *infra*). During colloquy with the trial court, defense counsel explained:

> MS. RIVKIN-CAROTHERS [defense counsel]: and it's an exam that determines the legal mental competency of a person to stand trial. And what that includes is whether or not the defendant is capable of understanding the procedures, which I'm sure Mr. Kagan is, whether or not he knows the parties, what the role of the defense attorney is, the prosecutor, the judge, which I'm sure Mr. Kagan does.
>
> The other critical question and legal question is whether or not he's capable of and able to assist his defense attorney in preparing a defense of this case.

Transcript of July 14, 1994 at pg. 16.

During the same proceeding, one of petitioner's physicians testified that it was possible that the continued use of certain medications might allow petitioner's level of stress to be ameliorated to the point where he could assist in pretrial preparation within four-six weeks (Tr. of 7/14/94 at Tr. 14). The trial court seemed somewhat piqued at the suggestion that petitioner may not be competent to stand trial. Defense counsel went on to explain that a critical and legal question is "whether or not he's capable of and able to assist his defense attorney in preparing a defense of this case" (*Id.* at 16). Defense counsel further explained that the critical question was ". . . whether or not a defendant is capable of assisting counsel in preparation of his own defense and [defense counsel] has indicated those problems to the court" (*Id.* at 17-18). The prosecutor successfully urged

rejection of defense counsel's competency importunings (*Id.* at 18-19).

On July 21, 1994, the date trial was to commence, defense counsel again moved for an adjournment contending, *inter alia*, that a confluence of circumstances compelled a trial adjournment to August 29, 1994 (Org. Rec. C. 148-150; App. 24-27, *infra*). Included in the reasons for a continuance was the late disclosure of information from the prosecution, prejudicial pretrial publicity and, that petitioner's physical condition precluded him from taking part in the preparation of his defense. In part, defense counsel's verified filing explained:

> Counsel for defendant seeks a continuance, again, based on the physical condition of her client, which condition has precluded him from taking part in the preparation of his defense, because of the stress related to going through the 784 pages of discovery the State has provided to date in this case. Mr. Kagan is unable to review these materials with counsel in the manner required to prepare for trial without extreme chest pains, and the need to take medication. Mr. Kagan's treating physician has him on a medical regiment designed to increase his ability to handle stress, including the stress of trial and trial preparation.
>
> * * *
>
> The only purpose in seeking a continuance is to give Mr. Kagan the time to be able to prepare and assist in the preparation of his defense . . .

(Org. Rec. C. 149-150; App. 26, *infra*).

Defense counsel's competency examination and adjournment entreaties were rejected, and petitioner's trial commenced with jury selection on July 21, 1994.

The trial culminated in plenary guilty verdicts on July 26, 1994 (C. 212-214). Petitioner's bail was revoked and on September 7, 1994, a 42-year prison sentence was imposed (C. 319-321). Petitioner has been immured since July 26, 1994.

Petitioner prosecuted a direct appeal, asserting in substance that his coronary maladies, when blended with the ongoing need to inject life support medications, rendered him the functional equivalent of a walking zombie, thus depriving him of any realistic opportunity to assist in his defense.

The Illinois Appellate Court rejected petitioner's due process and Sixth Amendment arguments, but reduced petitioner's sentence to thirty-years, *People v. Kagan*, 283 Ill.App.3d 212, 669 N.E.2d 1239 (2nd Dist. 1996). Petitioner's request for discretionary Illinois Supreme Court review, raising Fifth and Sixth Amendment issues was denied on December 4, 1996 (169 Ill.2d 579, 675 N.E.2d 637).

2. **Litigation Pursuant to 28 U.S.C. § 2254.**

Petitioner filed his § 2254 on December 4, 1997 (R. 1 in § 2254 record). The State of Illinois responded on March 27, 1998 (R. 13). Absent objection, petitioner was granted leave to supplement his § 2254 along with a supporting memorandum and compendium of exhibits (filed on November 24, 1998, R. 16-18, 20-22). The parties filed additional pleadings during 1999 (R. 26-28).

On June 23, 1999, the district court filed a memorandum order, opinion and judgment dismissing petitioner's § 2254, absent an evidentiary hearing (R. 29-

31; App. 2-14, *infra*). The district court's memorandum opinion explained that petitioner had exhausted the primary question of whether *the trial was conducted* while petitioner suffered substantial infirmities, App. 7-13. The district court noted that the petitioner had rejected the State's offer for a "medical furlough" (App. 11-12), but failed to note that the medical furlough option was early on while petitioner was in custody, and assuming, arguendo, it was available while petitioner was on bail—it meant that the petitioner would be remanded to custody, shackled, and transported by prison officials to a hospital where petitioner may have had the benefit of much-needed coronary surgery. Additionally, the district court failed to recognize that the *only medical testimony* presented to the trial court occurred on July 14, 1994, during which one of petitioner's cardiac physicians testified that with the use of certain prescribed medications, petitioner could probably assist in pretrial preparation within four-six weeks [of July 14, 1994] (Pretrial Tr. – 7/14/94 at Tr. 14). Likewise the district court's opinion failed to include any reference to the persistent prosecutorial objections to any trial adjournment, notwithstanding petitioner's extraordinary cardiac difficulties. Finally, the district court's memorandum opinion eschewed noticing not only the unexplained rush-to-trial (84 days from arrest to trial), but the total absence of any informed reason for the persistent objections by the State prosecutor to any trial adjournment. The district court opinion included:

> In short, Kagan has not shown that the Illinois Appellate Court's adjudication of this claim involved either an unreasonable application of clearly established Federal law as determined by the Supreme Court or "resulted in a decision

> that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d).

App. 12, *infra*.

On August 12, 1999, the district court declined petitioner's COA request (R. 36, App. 15-17, *infra*).

On October 12, 1999, petitioner filed his application, with exhibits, for a COA with the Clerk of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 2253. Petitioner sought a COA on the following issue:

Whether the Court below and the state court decision was contrary to, or involved an, unreasonable application of clearly established federal law as determined by the Supreme Court of the United States? Petitioner contends that the state court and district court decisions, were clearly contrary to, or involved an unreasonable application of United States Supreme Court precedent.

On March 17, 2000, the Court of Appeals for the Seventh Circuit summarily rejected petitioner's COA application (App. 1, *infra*).

REASONS FOR GRANTING THE WRIT

1. Whether certiorari should be granted, the judgment below vacated and the case remanded for reconsideration in light of the impacting intervening decisions in *Slack v. McDaniel*, 529 U.S. ___, 120 S.Ct. 1595 (2000) (Kennedy, J.), *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1495 (2000) (O'Connor, J.) and *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1479 (2000) (Kennedy, J.)?

2. Whether the failure to observe procedures designed to protect the petitioner's right not to be tried or convicted while incompetent to stand trial, deprived petitioner of his Fifth and Fourteenth Amendment Due Process Clause rights to a fair trial, and his Sixth Amendment right to [the] assistance of counsel in his defense?

1. Review should be granted, the judgment below reversed and the case remanded because neither the federal habeas court, nor the Seventh Circuit had the benefit of the Court's decisions in *Slack v. McDaniel*, 529 U.S. ___, 120 S.Ct. 1595 (2000) (Kennedy, J.), *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1495 (2000) (O'Connor, J.) and *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1479 (2000) (Kennedy, J.). For example, *Slack v. McDaniel* explains that:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that a reasonable jurist would find the district court's assessment of the constitutional claims debatable or wrong.

120 S.Ct. at 1604. In Justice O'Connor's opinion for the court in *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1495 (2000), she explained that when, and under what circumstances the federal habeas court can grant habeas claims which were adjudicated on the merits in State court:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court

> arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

1205 S.Ct. at 1523. Additionally, Justice Kennedy's opinion in *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1479 (2000), explained:

> A prisoner who developed his claim in state court and can prove the state court's decision was "contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," is not barred from obtaining relief by § 2254(d)(1). See *Williams v. Taylor, ante*, at ___ (opinion of O'Connor, J.).

120 S.Ct. at 1489.

Each of the intervening decisions impact on petitioner's case. For example, federal habeas rejection in petitioner's case is in clear conflict with Justice O'Connor's opinion for the Court in *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. at 1523, because the decision below is both "contrary to" and represents "[an] unreasonable application" of the Court's holdings in, *inter alia*, *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836 (1966); *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896 (1975); *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810 (1992); and *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373

(1996).[1] Further, petitioner can demonstrate that [a] reasonable jurist would find the district court's assessment of the constitutional claims debatable or wrong (*Slack v. McDaniel,* 120 S.Ct. at 1604). Here petitioner developed his claim in state court and can demonstrate that the state court's decision was "contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," [and] is not barred from obtaining relief by § 2254(d)(1). See *Williams v. Taylor, ante*, at 120 S.Ct. at 1489 (Justice Kennedy's opinion in *Williams v. Taylor* (citing to Justice O'Connor's *Williams v. Taylor* opinion for the court).

Since neither the district court nor the United States Court of Appeals for the Seventh Circuit had the benefit of the three intervening opinions of the Court, review should be granted, the judgment below vacated and the case remanded for reconsideration in light of the impacting intervening decisions.

2. Whether the failure to observe procedures designed to protect the petitioner's right not to be tried or convicted while incompetent to stand trial, deprived petitioner of his Fifth and Fourteenth Amendment Due Process Clause rights to a fair trial, and his Sixth

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[1] In *Dusky v. United States*, 362 U.S. 402, 402 (1960) (Per Curiam), the Court granted certiorari and remanded the petitioner's competency questions to the district court, explaining that the "test must be *whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding*—and whether he has a rational as well as factual understanding of the proceedings against him," 362 U.S. at 402 (ital. emph. added).

Amendment right to [the] assistance of counsel in his defense?

Petitioner has worded his second certiorari question by paraphrasing the issue in *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836 (1966), as it appears in *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 904 (1975). In *Pate*, Justice Clark, affirming the Seventh Circuit's grant of habeas relief, explained that the State conceded that the conviction of an accused person while he is legally incompetent violates due process, * * * and that state procedures must be adequate to protect [this] right, 382 U.S. at 378. However, the failure to follow Illinois statutory enactments regarding *Robinson's* competency deprived *Robinson* of a fair trial, 383 U.S. at 385.

In petitioner's case, the Illinois statutory enactments were adequate, but ignored. The 1994 Illinois Criminal Code, (reproduced in pertinent part, *ante* at pg. 3-4) notes that if a defendant is unfit because of his . . . physical condition . . . or to assist in his defense—[then] the court shall appoint one or more physicians and in addition, such other experts as it may deem appropriate to examine the defendant and to report to the court regarding the defendant's condition (summarizing 725 ILCS 5/104-10 and 13(b)). Here the State trial court disregarded the several written and verbal exhortations of defense counsel in support of a trial adjournment, as well as the testimony of a physician who testified that a six-eight week continuance, coupled with prescribed medication would allow the petitioner to (in all probability) fully participate with counsel in preparing his own defense (App. 20-22, *infra*; Tr. of 7/14/94 at pp. 7-14).

Starting with Justice Clark's opinion in *Pate v. Robinson*, 383 U.S. 375 (1996), we know that "the conviction of an accused while he is legally incompetent violates due process * * * and that State procedures must be adequate to protect this right," 383 U.S. at 378. The *Pate* opinion also explained that . . . "While Robinson's demeanor at trial might be relevant to the ultimate decision of his sanity, it cannot be relied upon to dispense with a hearing on that very issue," 383 U.S. at 386. This statement in *Pate* is *apropos* because on July 14, 1994, while declining to adjourn petitioner's criminal trial, the State trial court remarked:

> THE COURT: Well, you know, I really consider that last argument quite disingenuous, because Mr. Kagan has been in this court a number of times in connection with motions where he's proceeded, counsel being here, and stepped up and said, "my attorney is going to be late" and then otherwise directed the court as to what was happening. Mr. Kagan has struck me as being extremely alert, extremely in touch with reality and very competent in his addressing this court on those occasions that he has in an informal way. . . .

Tr. of 7/14/94 at pp. 16-17 (quotation marks in original transcript).[2] Defense counsel countered by explaining:

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[2] During June-July 1994, petitioner addressed the trial court on two occasions, explaining either that his attorney would be late or was unavailable. Nonetheless, the trial court may have harbored the view that since petitioner was an attorney, his constitutional entitlements were reduced. Not so. See *Spevack v. Klein*, 385 U.S. 511, 516 (1967) (lawyers also enjoy first-class citizenship); *Glasser v. United States*, 315 U.S. 60, 68-70

(continued...)

> MS. RIVKIN-CAROTHERS: Well, I'm not saying it is a mental deficiency. What I'm saying is that the legal standard is whether or not a defendant is capable of assisting counsel in preparation of his own defense. And I've indicated to the court the problems that I've had.

Id. at pp. 17-18.[3]

In *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896 (1975), Chief Justice Burger delivered the Court's opinion vacating the denial of post-conviction relief where the primary question was whether *Drope* was deprived of due process by the failure of the trial court to order a psychiatric examination with respect to his competency to stand trial, 420 U.S. at 163-164. Pretrial, *Drope's* attorney filed a motion to adjourn the trial date

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[2] (...continued)
(1942) (Glasser-an erstwhile AUSA [was] entitled to Sixth Amendment conflict-of-interest protections).

[3] In *Watts v. Singleterry*, 87 F.3d 1282, 1287 (11th Cir. 1996), a divided court vacated the denial of § 2254 relief, but explained [that] "because legal competency is primarily a function of defendant's role in assisting counsel in conducting the defense, *the defendant's attorney is in the best position to determine whether the defendant's competency is suspect*," (ital. emph. added); accord, *United States v. Boigegrain*, 155 F.3d 1181, 1188 (10th Cir. 1998) (Of all the actors in a trial, defense counsel has the most intimate association with the defendant. Therefore, the defendant's lawyer is not only allowed to raise the competency issue, but, because of the importance of the prohibition on trying those who cannot understand proceedings against them, she has a professional duty to do so when appropriate. * * *). In *Drope v. Missouri, ante and infra*, the Court noted that defense counsel's representation concerning the competency of his client is unquestionably a factor which should be considered, 420 U.S. at 177, n. 13 (citations omitted).

in order that *Drope* might be examined for competency at the time of the offense and competency to stand trial. The trial court rejected the motion noting, *inter alia*, that the motion was not in proper form, *id.* at 165. While reversing the denial of relief below, Justice Burger explained:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity . . . to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. * * * For our purposes, it suffices to note that the prohibition is fundamental to an adversary system of justice.

420 U.S. at 171-172 (internal authorities omitted). Justice Burger then explained the holding in *Pate v. Robinson*:

> In *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), we held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial. Although in *Robinson* we noted that Illinois "jealously guard[ed]" this right, *id.*, at 385, 86 S.Ct. at 842, we held that the failure of the state courts to invoke the statutory procedures deprived Robinson of the inquiry into the issue of his competence to stand trial to which, on the facts of the case, we concluded he was constitutionally entitled.

420 U.S. at 172. *Drope* also explained:

> Especially in cases arising under the Due Process Clause [is] it important to distinguish between issues of fact that are here foreclosed and

> issues which, though cast in the form of determinations of fact, are the very issues to review which this court sits.

420 U.S. at 175, n. 8 (parallel citations omitted).[4]

In *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810 (1992), the Court reversed a capital conviction, finding that the forced administration of antipsychotic medications violated *Riggins'* right to a fair trial. Justice Kennedy, concurring, explained:

> *Concerns about medication extend also to the issue of cooperation with counsel. We have held that a defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer.*

504 U.S. at 144 (ital. emph. added, supporting citations omitted).

The case at hand is strikingly similar to *Riggins*. In *Riggins*, his attorney sought a pretrial court order discontinuing the involuntary ingestion of antipsychotic drugs in advance of trial. The trial court denied the request, and *Riggins'* trial went forward while he con-

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[4] Petitioner concedes that *Drope's* footnote 8 appears grammatically puzzling. However, given the putative § 2254 deference to State court determinations, petitioner contends that footnote 8 means (at least where there is a Due Process Clause-competency-challenge), the customary presumption of correctness is abated. Accord, *Barnett v. Hargett*, 174 F.3d 1128, 1135-36 (10th Cir. 1999) (affirming conditional grant of § 2254 relief where defendant's competency was at issue, noting that a State court's competency determination arrived at with an incorrect standard of proof is not entitled to a presumption of correctness and is analogous to no competency hearing at all—citing *Pate v. Robinson* and *Cooper v. Oklahoma*).

tinued the involuntary ingestion of antipsychotic medications. Justice O'Connor's opinion for the Court noted that the district court allowed the involuntary administration of the drugs without making:

> . . . *any* determination for the need of this course or *any* findings about reasonable alternatives.

504 U.S. at 136 (ital. emph. in original).

There is precious little difference between *Riggins* and the case at hand. Petitioner, being denied the opportunity for pretrial cardiac surgery, was compelled, for day-to-day survival, to ingest a medley of coronary prescription medications, prior to and during trial. As a result of ingesting the essential-survival medications the petitioner was "basically, a zombie," (App. 29, *infra*). Hence the harm to petitioner parallels precisely the constitutional harm endured by *Riggins*. Here petitioner, having been denied the opportunity for pretrial cardiac surgery, was compelled to ingest life-support and cardiac medications in advance of, and during trial. Thus, petitioner contends that for Due Process Clause purposes there can be no constitutional distinction between the forced medications in *Riggins* and the compelled ingestion of essential coronary and related medications (see Pet.'s § 2254 affidavit at App. 28-30, *infra*).[5] In *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct.

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[5] In *Riggins*, Justice O'Connor rejected harmless error balancing ("We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently had he not been given Mellaril"; 504 U.S. at 137). In *United States v. Weston*, 206 F.3d 9 (DC Cir. 2000), the court held that a pretrial detainee could not be

(continued...)

1373 (1996), Justice Stevens, for the full Court, explained:

> No one questions the existence of the fundamental right that petitioner invokes. We have repeatedly and consistently recognized that "the criminal trial of an incompetent defendant violates due process." * * * *Drope v. Missouri*, 420 U.S. 161, 171-172, 95 S.Ct. 896, 903-904, 48 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966). Nor is the significance of this right open to dispute. As Justice KENNEDY recently emphasized:
>
> "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. *Drope v. Missouri*, 420 U.S. 161, 171-172, 95 S.Ct. 896, 903-904, 48 L.Ed.2d 103 (1975)." *Riggins v. Nevada*, 504 U.S. 127, 189-190, 112 S.Ct. 1810, 1817-1818, 118 L.Ed.2d 479 (1992) (opinion concurring in judgment. [n.4]).

* * * * *

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[5] (...continued)
required to ingest antipsychotic medications, citing *Riggins*. In part, Circuit Judge Tatel's concurring opinion explained that forced medication impaired the fair trial guarantees of the Fifth and Sixth Amendment (*Weston's* fair trial rights include rights (1) not to be tried unless he is competent to "consult with counsel, and to assist in preparing his defense," (citing *Drope v. Missouri*, 420 U.S. at 171; 206 F.3d at 20).

> For the defendant, the consequences of an erroneous determination of competence are dire. Because he lacks the ability to communicate effectively with counsel, he may be unable to exercise other "rights deemed essential to a fair trial." *Riggins v. Nevada*, 504 U.S. at 189-190, 112 S.Ct., at 1817 (KENNEDY, J., concurring in judgment).

517 U.S. at 354, 364 (n. 4 omitted).

An obvious question becomes whether the trial should have been temporarily adjourned until the need for at least some of the life-support medications abated, or until petitioner underwent cardiac surgery? Can it be gainsaid that none of the medications were capable of producing side effects that impaired clarity of mind? Recall that within petitioner's uncontroverted § 2254 affidavit he was described as "basically, a zombie" (App. 29, *infra*). Was petitioner's health (and for Due Process Clause purposes-competency) so unimportant to the trial court and Illinois prosecutors that a "rush"-to-trial was obligatory?[6]

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[6] In *United States v. Lopez*, 71 F.3d 954, 958 (1st Cir. 1995), the court considered a similar situation, but noted that the district court did not ignore the issue of the defendant's health ("Far from ignoring the issue, the trial court deferred trial for a substantial period, summoned medical experts one after another, took an active role in securing diagnoses for *Lopez*, had him re-examined repeatedly, and took testimony and made findings in abundance, including a detailed post-trial order summarizing the court's findings and reasons for proceeding with trial"). In *Lopez*, the district court's appointed expert testified that *Lopez* was fit to testify, 71 F.3d at 959.

Juxtaposing *Lopez* to petitioner's case, the sole parallel is the obvious health obstacles each suffered prior to, and during

(continued...)

In *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841 (1964), the Court affirmed a criminal contempt conviction after *Ungar* was granted a five-day continuance to prepare for the contempt hearing. Notwithstanding the limited and clear-cut contempt issue, Justice White explained:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. * * * Contrariwise, *a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.*

376 U.S. at 589 (ital. emph. added).

In sum, the decision below, conflicts with the Court's precedent, *viz.*, exposing an incompetent accused to trial. Additionally, the case below cannot be squared with the § 2254 April 2000 Court opinions as explained, *ante*.

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[6] (...continued)

trial. However, in *Lopez*, the district court demonstrated realistic concerns for *Lopez* as both a human being and criminal accused. The case at bar is the functional opposite—neither the trial court nor the sovereign was at all concerned with anything other than [a] "rush-to-trial."

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

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App. 1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 7, 2000
Decided March 17, 2000

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

No. 99-3077

RICHARD KAGAN,

Petitioner-Appellant,

v.

THOMAS ROTH, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 8424—Wayne R. Andersen, *Judge*.

ORDER

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court denied the petition and declined to issue a certificate of appealability. Petitioner now has filed an application for a certificate of appealability.

This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

App. 2

[Dated June 23, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. RICHARD KAGAN,	)	
Petitioner,	)	No. 97 C 8424
v.	)	
	)	Honorable
THOMAS ROTH and JAMES E. RYAN, Illinois Attorney General,	)	Wayne R. Andersen
Respondents.	)	

MEMORANDUM OPINION AND ORDER

Following a jury trial in the Circuit Court of Lake County, Richard Kagan ("Kagan") was convicted of solicitation of murder for hire and attempted first-degree murder. He was sentenced to consecutive terms of 30 years imprisonment for solicitation to commit murder and 12 years imprisonment for attempted first-degree murder. The convictions were affirmed by the Illinois Appellate Court and Kagan's petition for leave to appeal to the Illinois Supreme Court was denied. Kagan is currently serving his sentence at Dixon Correctional Center located in Dixon, Illinois. He now petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his convictions. He names as respondents his custodian, Thomas P. Roth, and James E. Ryan, as the Illinois Attorney General. James E. Ryan is dismissed from this action because

"the only proper respondent in a collateral attack is the petitioner's custodian." *Hogan v. Hanks*, 97 F.3d 189, 190 (7th Cir. 1996), *cert. denied*, 520 U.S. 1171, 117 S.Ct. 1439, 137 L. Ed. 2d 546 (1997). For the reasons discussed below, the petition for a writ of habeas corpus is denied.

BACKGROUND

In April 1994, Kagan paid $10,000 to Ronald Petkus, a reputed enforcer for the Hell's Henchmen motorcycle gang, to murder his wife, Margaret Kagan. Kagan and his wife were entrenched in a bitter divorce dispute at the time. Kagan was a criminal defense attorney who had previously represented Petkus. While Margaret was in Chicago meeting with Kagan and his attorney about the divorce, Petkus and Cragin, another Hell's Henchman, planted a bomb under Margaret's car at the Fort Sheridan Metra train station. When Margaret returned and started her car, the bomb exploded, setting the car on fire. Margaret escaped from the burning car with only minor injuries. Kagan was arrested on April 28, 1994.

On May 4, 1994, a Lake County grand jury returned a three-count indictment charging Kagan with solicitation to commit murder, attempted first-degree murder, and conspiracy to commit first-degree murder. On July 21, 1994, the case proceeded to trial and, five days later, the jury found Kagan guilty on each count. The trial court entered judgments on the first two counts, and sentenced Kagan to consecutive terms of imprisonment of 30 years for solicitation of murder for hire and 12 years for attempted first-degree murder. Kagan then

filed a timely notice of appeal to the Illinois Appellate Court arguing that the trial court abused its discretion when it denied his motion for a continuance because of his physical condition, and that the trial court erred in sentencing Kagan to consecutive sentences. The Illinois Appellate Court affirmed the convictions finding that the trial court did not abuse its discretion in denying Kagan's motion for a continuance. *People v. Kagan*, 283 Ill.App.3d 212, 219, 669 N.E.2d 1239, 1244, 218 Ill.Dec. 713, 718 (1996). The Court found that the trial court erred in imposing consecutive sentences of imprisonment and accordingly modified the sentences to run concurrently. *Id.* at 1247.

Kagan then filed a petition for leave to appeal to the Illinois Supreme Court. In his petition, Kagan argued that he was entitled to a hearing pursuant to 725 ILCS 5/114-4 to determine whether he was physically competent to stand trial and that he was denied his Fifth and Sixth Amendment rights when he was required to demonstrate prejudice resulting from his inability to participate in his defense because of his physical condition. The Illinois Supreme Court denied leave to appeal. *People v. Kagan*, 169 Ill.2d 579, 675 N.E.2d 637, 221 Ill.Dec. 442 (1996). On December 4, 1997, Kagan filed a habeas petition in this case and, on November 24, 1998, a supplemental petition. He argues that the denial of his motion for a continuance violated his right to a fair trial and his right to effective assistance of counsel because his physical and emotional problems prevented him from cooperating with his defense lawyer. He also claims that his trial lawyer was ineffective for failing to follow the proper statutory procedure in her failed attempts to get a continuance and for failing

to employ an expert witness to examine the post-bombing condition of the car.

DISCUSSION

Federal courts may issue a writ of habeas corpus if a petitioner demonstrates that he is "in [state] custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Moffat v. Gilmore*, 113 F.3d 698, 702 (7th Cir. 1997); see *also Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1370 (7th Cir. 1994) (en banc) ("[F]ederal courts can grant habeas relief only when there is a violation of federal statutory or constitutional law.") (citation and internal quotations omitted), *cert. denied*, 514 U.S. 1037, 115 S.Ct. 1404, 131 L. Ed. 2d 290 (1995). The federal courts may not grant habeas relief under Section 2254 unless the state court's judgment "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Before a federal court may review the merits of a habeas petition, a petitioner must: "(1) exhaust all remedies available in state courts; and (2) fairly present any federal claims in state court first, or risk procedural default." *Bocian v. Godinez*, 101 F.3d 465, 468 (7th Cir. 1996) (citations omitted); *see also Henderson v. Thieret*, 859 F.2d 492, 496 (7th Cir. 1988), *cert. denied*, 490 U.S. 1009, 109 S.Ct. 1648, 104 L. Ed. 2d 163 (1989). "The habeas petitioner must present his

federal constitutional claims initially to the state courts in order to give the state the 'opportunity to pass upon and correct alleged violations of its prisoners' federal rights.'" *McGowan v. Miller*, 109 F.3d 1168, 1172 (7th Cir. 1997) (quoting *Duncan v. Henry*, 513 U.S. 364, 365, 115 S.Ct. 887, 130 L. Ed.2d 865 (1995) (citation omitted)). In this case, exhaustion is not at issue. Respondent concedes that Kagan has exhausted his state court remedies for purposes of federal habeas review because he has no further avenues in state court through which to challenge his convictions. We now turn to the issue of procedural default.

The procedural default hurdle forbids the federal courts from addressing claims that were not fairly presented to the state courts. *Jones v. Washington*, 15 F.3d 671, 675 (7th Cir.), *cert. denied*, 512 U.S. 1241, 114 S.Ct. 2753, 129 L. Ed. 2d 870 (1994). Procedural default occurs either when a state court has declined to address a federal claim because the petitioner failed to satisfy an independent and adequate state procedural requirement, *Coleman v. Thompson*, 501 U.S. 722, 729-30, 111 S.Ct. 2546, 2554, 115 L. Ed. 2d 640 (1991), or when the petitioner fails to present a claim to the state courts at the time, and in the way, required by the state. *Hogan v. McBride*, 74 F.3d 144, 146 (7th Cir. 1996). In determining whether a petitioner has forfeited or procedurally defaulted any of his claims, we look solely to state law. As the Seventh Circuit has explained, "[f]orfeiture depends on state law, and it is accordingly essential to know whether the state courts either have held that a procedural misstep is a forfeiture, or would so hold if a collateral attack were filed in state court." *Id.* at 147.

We find that Kagan has preserved his first claim for federal habeas review. On direct appeal Kagan argued that the trial court denied him a fair trial when it refused to continue the trial even though the court was informed that Kagan's physical condition prevented him from preparing his defense. While Kagan did not cite "book and verse on the federal constitution," he asserted his "claim in terms so particular as to call to mind a specific constitutional right protected by the Constitution." *United States ex rel. Sullivan v. Fairman*, 731 F.2d 450, 454 (7th Cir. 1984) (internal quotations omitted). Indeed, Kagan cited throughout his appellate brief the effect the trial court's decision had on his ability to prepare his defense and the fairness of proceeding under such circumstances. Kagan also raised the substance of this claim in his petition for leave to appeal to the Illinois Supreme Court by asserting that his physical condition precluded him from assisting counsel in the preparation of his defense. *O'Sullivan v. Boerckel*, ___ U.S. ___, 119 S.Ct. 1728 (1999) (holding that the failure to raise a claim in a petition for discretionary review before the Illinois Supreme Court results in a procedural default). This is sufficient to preserve this claim. Kagan did not procedurally default this claim by failing to raise it in a petition for post-conviction relief because the doctrine of res judicata would have barred review of this claim. *Cawley v. DeTella*, 71 F.3d 691, 694 (7th Cir. 1995).

The Supreme Court has "repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S.Ct. 1373, 1379, 134 L. Ed. 2d 498 (1996) (internal quotations omitted). The minimum

standard of competency under federal due process is "whether [a person] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *United States ex rel. Mireles v. Greer*, 736 F.2d 1160, 1165 (7th Cir. 1984). Under Illinois law, "[w]hen a bona fide doubt of the defendant's fitness is raised, the court shall order a determination of the issue before proceeding further." 725 ILCS 5/104-11(a). The state procedures, if followed, are "constitutionally adequate." *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 904, 43 L. Ed. 2d 103 (1975). Therefore, we must decide whether, at the time of trial, it was reasonable for the trial court to decide that there was no bona fide doubt as to the competency of Kagan to stand trial.

The events relevant to this determination began on May 13, 1994 when Kagan filed a motion to reduce bond. He stated that before his arrest he had scheduled heart surgery to remedy a cardiovascular condition and that, without immediate surgery, he could die. He claimed that his medical condition prevented him from participating in the preparation of his defense. He claimed that when he met with his lawyer to prepare for trial he had to abruptly end the meeting because the stress of the discussions brought on a seizure. Nonetheless, Kagan rejected the State's offer to agree to a medical furlough. Kagan then testified in support of his motion to reduce bond that he suffered a ruptured aneurysm in his carotid artery in 1988 and was also diagnosed with angina pectoris. He testified that a special surgery at a medical center in Phoenix, Ari-

zona was necessary to remove blockage that was found in two of his arteries. The trial court denied Kagan's motion but indicated its willingness to entertain a medical furlough based on either evidence that immediate surgery was necessary or an agreement between the parties.

On June 1, 1994, Kagan filed a motion for a continuance and a motion to expand bond to allow him to travel to Arizona because his deteriorating condition allegedly required him to undergo a special cardiovascular surgery. He argued that the trial should be continued because without surgery he would be unable to assist in the preparation of his defense. The motion to expand bond was heard on June 16. Kagan testified about the medical procedure and indicated that, although Washington, D.C. and Chicago had facilities able to perform the procedure, the medical center in Arizona had the most experience performing the procedure. He testified that his treating physician told him not to participate in courtroom activities. He also stated that he was unable to assist in his defense because he suffered from significant chest pain, fatigue, and dizziness, which caused him to collapse during one conference with his lawyer. The trial court denied the motion finding that Kagan was a flight risk and that there was not a medical emergency because Kagan worked approximately 12 hours a week at his law firm and regularly appeared at his divorce proceedings.

The trial court heard the motion for a continuance on July 6. Defense counsel indicated that she was not prepared to address the motion. In response to the trial court's inquiry if she wished to add to the motion, counsel stated that Kagan was no longer a good candi-

date for the procedure in Arizona and that bypass surgery was now needed because of Kagan's kidney condition. The trial court denied the motion stating that "[t]here is no testimony from anyone that [the] degree of blockage is something that requires immediate surgery. As a matter of fact, I have been seeing [Kagan] regularly in court; I don't know that there is any emergency . . . ." This motion was followed with another motion for a continuance on July 14 requesting the court to hold a mental competency hearing under 725 ILCS 5/114-4. Defense counsel argued that the trial court should hold a hearing to determine Kagan's mental competency to stand trial because the stress of a trial exacerbated his mental condition so much that he was unable to cooperate with counsel. Also, Kagan's internist opined that the rigors of a trial would continue to aggravate Kagan's symptoms.

The trial court denied the motion finding that there was no evidence that Kagan was unable to cooperate with counsel due to an emotional defect or that he was unable to understand the proceedings. The court noted that Kagan had appeared in court on a number of occasions and appeared alert, in touch with reality, and competent when he addressed the court. The court found no evidence to raise any questions as to Kagan's mental or emotional ability to cooperate with counsel. The court also concluded that there was no evidence presented that Kagan's physical condition rendered him incompetent to stand trial. On the day trial was set to begin, Kagan filed one last motion for a continuance arguing that his physical condition precluded him from assisting in his defense. This issue, however, was not argued at the hearing on the motion. Meanwhile,

Kagan never had his doctors contact the State's Attorney so that arrangements could be made for a medical furlough, as suggested by the State at the initial hearing on Kagan's motion to reduce bond.

Based on these facts, the Illinois Appellate Court found that there was "no evidence that raised a bona fide doubt that defendant was incapable of cooperating with his counsel." *People v. Kagan*, 669 N.E.2d at 717. The Court noted that the trial court observed Kagan in court with counsel, pro se, and during his testimony and found him to be capable of understanding the proceedings and assisting his counsel. *Id.* The trial court's determination that Kagan was fit to stand trial is a finding of fact. *Maggio v. Fulford*, 462 U.S. 111, 117, 103 S.Ct. 2261, 2264, 76 L. Ed. 2d 794 (1983) (per curiam). We must presume that this finding is correct, and the burden is on Kagan to rebut this presumption with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Acknowledging his burden, Kagan has submitted transcripts of the state proceedings which, in his view, establishes that the trial court created "a prosecutorial advantage by continually denying petitioner an opportunity to get the essential medical treatment which would have allowed petitioner to fully participate in pretrial investigation and preparation." (Pet'r Mem. at 4).

After a careful review of the record, we find that Kagan has failed to rebut by clear and convincing evidence the presumption that the trial court correctly determined that he was fit to stand trial. The trial court, rather than impeding Kagan's ability to obtain medical treatment, early on attempted to accommodate Kagan through a medical furlough but Kagan insisted

on a reduction in bond. The court also provided Kagan an opportunity to present evidence as to the seriousness of his medical condition and how it was affecting his ability to prepare for trial. Dr. Adelson testified about Kagan's medical condition and opined that the stress and rigors of a trial would exacerbate the chest pains Kagan was experiencing. On cross-examination, Dr. Adelson acknowledged that Kagan was capable of reading and comprehending and that "what we're really talking about here is stress." Ex. 2 at p.13. The trial court found this testimony insufficient to raise a question as to Kagan's ability "to cooperate with counsel because of any emotional defects or any inability to understand the nature of these proceedings." *Id.* at 17. Kagan has given us no reason to conclude otherwise.

In short, Kagan has not shown that the Illinois Appellate Court's adjudication of this claim involved either an unreasonable application of clearly established Federal law as determined by the Supreme Court or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d). The trial court had an opportunity to observe Kagan's conduct in the courtroom and, based on the evidence before it (including the testimony of Kagan and Dr. Adelson), concluded that there was not a bona fide question as to Kagan's ability to stand trial. A court on federal habeas review "may not substitute its own judgment concerning the credibility of witnesses in a state proceeding to determine a defendant's competence to stand trial." *United States ex rel. Bilyew v. Franzen*, 842 F.2d 189, 192 (7th Cir. 1988). Kagan's self-serving, unsigned affidavit is insufficient to call into doubt the trial court's finding. For

these reasons, this claim is not a proper basis for habeas relief.

Kagan also claims that his trial lawyer was ineffective because she failed to employ an expert to analyze his wife's car after the bombing. Kagan failed to raise this claim in the state courts, but claims that he first learned that the physical condition of the car conflicted with the testimony of a State witness only after his direct appeal was denied and after the expiration of the time for him to file a post-conviction petition. To prevail on this claim, Kagan must demonstrate that his trial lawyer's performance fell below an objective standard of reasonableness and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.-Ed. 2d 674 (1984). Nowhere does Kagan explain the nature of the evidence relating to the post-bombing condition of the car. Absent this information, we cannot determine whether his trial lawyer was constitutionally ineffective by failing to hire an expert to examine the car or whether there is a reasonable probability that this evidence would have changed the outcome. This claim is therefore without merit.

Finally, Kagan argues that his trial lawyer was ineffective because she "failed to follow the Illinois statutory mandates in her failed efforts to secure a trial adjournment." (Supp. Pet. at p.6). Kagan failed to assert this claim on direct appeal. He claims that his appellate lawyer was ineffective for failing to raise this issue and that this serves as "cause" to excuse his procedural default. Although ineffectiveness of appellate counsel can constitute "cause" for purposes of procedur-

al default, Kagan has not satisfied the prejudice prong of the cause and prejudice test. He fails to identify specifically what his trial lawyer failed to do in moving for a continuance. Based on his affidavit, Kagan apparently believes that his trial lawyer was ineffective for failing to submit the affidavits of several physicians who testified about Kagan's medical condition and the need for a continuance. Because Kagan does not explain the nature of this testimony or how it differed from Dr. Adelson's testimony, we cannot conclude that his trial lawyer's alleged errors prejudiced Kagan. Therefore, this claim is procedurally defaulted and is without merit.

CONCLUSION

For all of the foregoing reasons, Richard Kagan's petition for a writ of habeas corpus is denied. We also deny Kagan's request for an evidentiary hearing because he has failed to show how an evidentiary hearing would be helpful in assessing the evidence he has produced in support of his petition. *See* 28 U.S.C. § 2254, Rules Governing § 2254 Cases, Rule 8(a).

It is so ordered.

/s/ Wayne R. Andersen
United States District Judge

Dated: June 23, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 97 C 8424 Date: August 12, 1999

Name of Assigned Judge: Wayne R. Andersen

Case Title: Richard Kagan v. Thomas Roth

* * * * *

DOCKET ENTRY:

* * * * *

(10) X [Other docket entry]

(11) X [For further detail see order (on reverse side of/attached to) the original minute order.]

* * * * *

[Reverse Side]

(Reserved for use by the Court)

ORDER

This matter is before the court on the motion of petitioner, Richard Kagan, for a certificate of appealability. For the reasons discussed below, the motion is denied.

Under 28 U.S.C. § 2253(c)(2), "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." This standard differs only in scope from the certificate of probable cause standard that was previously developed and applied by the courts. *Herrera v. United States*, 96 F.3d 1010, 1012 (7th Cir. 1996). "The two certificates differ only in scope: a certificate of

probable cause places the *case* before the court of appeals, but a certificate of appealability must identify each *issue* meeting the 'substantial showing' standard . . . ." *Id.* Therefore, in order for the district court to grant a certificate of appealability it must identify the issues that "are debatable among jurists of reason" or that are "adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4, 103 S. Ct. 3383, 3395 n. 4, 77 L. Ed. 2d 1090 (1983) (internal quotations omitted).

Kagan requests a certificate of appealability on the following two questions: "(a) Whether the entire record tends to establish that the petitioner's serious cardiac-health-related maladies rendered him incompetent to stand trial under the 5th and 6th amendments (due process and ability to assist counsel in his defense), contrary to or unreasonably applying settled United States Supreme Court precedent? and (b) Whether there is a constitutionally recognized *per se* conflict of interest under circumstances where defense counsel advises the trial court, prior to trial, that the defendant cannot assist in preparing his, defense, but nonetheless goes forward in a serious felony trial?" (Mem. at p. 2).

On June 23, 1999, this court denied Kagan's petition finding that his claims were without merit. *We* found that Kagan had failed to rebut by clear and convincing evidence the presumption that the trial court correctly determined that he was fit to stand trial. We found that the trial court had an opportunity to observe Kagan's conduct in the courtroom and, based on the evidence before it (including the testimony of Kagan and Dr. Adelson), concluded that there was not a bona fide question as to Kagan's ability to stand trial. We

decline to issue a certificate of appealability on Claim (a) because it is based entirely on the trial court's conclusion that Kagan was fit to stand trial, a finding that is not called into question by clear and convincing evidence in the trial record. We also deny Kagan's request for a certificate of appealability on Claim (b) because it too rests on this factual finding and, in any event, was never presented to the state courts.

For all of the foregoing reasons, we deny petitioner's request for a certificate of appealability. The Clerk of the District Court for the Northern District of Illinois is directed to submit a copy of this order to the Clerk of the United States Court of Appeals for the Seventh Circuit.

It is so ordered.

/s/ Wayne R. Andersen
United States District Judge

Dated August 12, 1999

[Filed June 1, 1994]

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)	
)	No. 94 CF 795
vs.)	
)	Judge Scott
RICHARD KAGAN)	

MOTION TO EXPAND THE BOND REQUIREMENTS TO ALLOW DEFENDANT TO TRAVEL TO ARIZONA FOR THE PURPOSE OF RECEIVING CARDIOVASCULAR SURGERY

Now comes the Defendant, RICHARD KAGAN, by his, attorney, ANITA RIVKIN-CAROTHERS, and asks this Honorable Court for an Order expanding the conditions of bail bond to allow Defendant to travel to Arizona for the purpose of receiving cardiovascular surgery. In support whereof, Defendant states:

1. Mr. Kagan is presently released on a One Million Dollar Bond.

2. Mr. Kagan suffers a cardiovascular condition which requires immediate surgery. He was, and had been, scheduled for surgery for the day following his arrest in this cause.

3. Because of his deteriorating condition, without surgery, Mr. Kagan has been and will be unable to assist in the preparation of his defense.

4. Mr. Kagan is requesting that the conditions of his bond be expanded to allow him to travel to the Arizona Heart Institute, in Phoenix, Arizona. Dr. Strumpf, car-

diologist at the Arizona Heart Institute, has agreed to schedule surgery for Mr. Kagan on June 20, 1994. The hospitalization requirements would be approximately 10 days, absent any unforeseen complications. Mr. Kagan is therefore asking permission to leave Chicago to travel to Phoenix, Arizona on June 17, 1994. He would expect to return to Chicago July 1 or 2, 1994.

5. While the procedure that has been recommended for Mr. Kagan is now being performed in the Chicago area, at the Northwestern Memorial Hospital, the Northwestern team has only been doing the procedure for a few weeks. Until a few weeks ago, the procedure recommended for Mr. Kagan was only performed at George Washington Hospital and at the Arizona Heart Institute, in Phoenix. The recommendation from his treating physician at Evanston Hospital, is that Mr. Kagan should have the procedure done at the Arizona Heart Institute, because of its vast amount of experience, and the routinization of the procedure at that facility.

WHEREFORE, Defendant asks that he be granted an order allowing him to travel to Phoenix, Arizona on June 17, 1994, and to return to Chicago on July 2, 1994.

/s/ Anita Rivkin-Carothers
Attorney for Defendant

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(312) 641-2901

App. 20

[Filed July 14, 1994]

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	No. 94 CF 795
vs.	)	
	)	Judge Scott
RICHARD KAGAN	)	

MOTION FOR CONTINUANCE

Defendant, RICHARD KAGAN, by one of his attorneys, ANITA RIVKIN-CAROTHERS, pursuant to Chapter 38, Section 114-4, moves this Honorable Court for an order continuing the trial in the captioned cause. In support thereof Defendant states as follows:

1. Mr. Kagan was arrested on April 28, 1994 and charged in the captioned indictment with solicitation to commit murder.

2. The State has tendered to date, 734 pages of discovery, plus 3 tape cassettes. They have listed approximately 60 witnesses that they may call.

3. Mr. Kagan has been under the constant care of physicians in connection with a coronary condition since before the arrest in this case.

4. Mr. Kagan, because of the coronary condition, has been unable to assist his attorney in the preparation of his defense, because of chest pains and the need for nitroglycerin tablets.

5. Counsel for defendant does not purport to be a medical expert, but it is apparent that the stress of

dealing with the details necessary to prepare a defense, are more than Mr. Kagan can handle at this time.

6. Because of Mr. Kagan's inability to assist in the preparation for trial, counsel has just learned of a material witness, whose testimony counsel believes to be critical to set and perfect the impeachment of the State's main witness, Ronald Petkus, as to motive, bias and credibility. Counsel first learned of the existence of this potential witness from Mr. Kagan on or about July 5. Counsel has engaged an assistant to track down the witness, using the last known address and telephone numbers. To date, we have not been able to speak with the witness, but we are still pursuing avenues that we believed will be successful, if we can have some additional time.

7. In addition to the question of Mr. Kagan's physical competence to stand trial at this time, Counsel for defendant believes that she has a duty to her client and a responsibility to the Court to seek a determination as to whether Mr. Kagan is mentally competent, pursuant to legal standards, to stand trial at this time. While Counsel does not suggest that Mr. Kagan is insane, there is a legal question of whether a person is mentally competent to stand trial, when he is not able to assist in the preparation of his own defense. Mr. Kagan has exhibited what counsel believes to be characteristics that he is mentally unable to deal with the issues and questions of fact, so as to assist counsel in the preparation of a defense.

8. The charges in this case are serious, carrying with them potential sentences of up to 85 years. With stakes this high, the defendant has a due process right to pre-

sent the most effective and aggressive defense possible. We cannot present an aggressive and effective defense when defendant is not competent to assist counsel in the preparation of that defense.

9. Mr. Kagan's treating physician has stated that the rigors of trial may create pain and discomfort for Mr. Kagan. The doctor has indicated that he believes with treatment of medication Mr. Kagan would be in a better physical condition to endure the rigors of a trial within a reasonable period of time.

10. The defendant is seeking a reasonable period of time to attempt to locate a material witness, whose testimony is essential to the defense.

11. The continuance of this trial will in no way prejudice the prosecution, as the case has been indicted for less that 90 days.

12. While the defendant recognizes that the court has set aside a certain time for this trial, the defendant would be willing to wait until this court is available to hear this matter.

WHEREFORE, for all of these reasons, the defendant respectfully asks that this motion be granted.

/s/ Anita Rivkin-Carothers
Attorney for Defendant

Anita Rivkin-Carothers
33 North LaSalle Street
Suite 3300
Chicago, Illinois 60602
(312) 641-2901

STATE OF ILLINOIS)
)
COUNTY OF COOK)

I, Anita Rivkin-Carothers, being duly sworn on oath state that I have read the foregoing motion for continuance, and that the same is true to the best of my knowledge and belief.

/s/ Anita Rivkin-Carothers
Anita Rivkin-Carothers

Subscribed and Sworn to before me
this 14th day of July, 1994.

/s/ Charles J. Scott
Judge

App. 24

[Filed July 21, 1994]

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)	
)	No. 94 CF 795
vs.)	
)	Judge Scott
RICHARD KAGAN)	

MOTION FOR CONTINUANCE

Defendant, RICHARD KAGAN, by his attorney, ANITA-RIVKIN CAROTHERS, moves this Honorable Court for continuance. In support thereof Defendant states as follows:

1. On July 14, 1994, Defendant filed a motion to produce, seeking the government to produce the reports of Agent Chavarria regarding a "confidential source" who stated that defendant, Richard Kagan was the target of the bombing. The court agreed that this was *Brady* material and ordered-that the State produce such reports by Friday, July 15, 1994. The materials were not produced on Friday, and as of 10:30 p.m., July 17, 1994, the reports had not been produced.

2. On the day of trial, July 18, 1994, the materials requested were produced by the State. Those materials contain information that is, in fact, exculpatory to the defendant. However, the materials require that defense counsel locate and interview certain witnesses, that are material witnesses to the exculpatory statements. Counsel has located one witness, but has not had the opportunity to speak with him regarding his testimony.

There is another witness that counsel has attempted to locate, but without success at this time. Co-counsel, is out today, attempting to interview and serve a subpoena on this witness.

3. Because the defense has just learned of this information two days ago, we are entitled to time to investigate, particularly where this delay was not caused by the defense, and is not an effort by the defense to unduly delay this trial.

4. In this case, Mr. Kagan is facing a potential sentence of 77 years in prison. He has a right to be given sufficient time to prepare to defend against these charges and present his defense in a coherent manner.

5. Defendant seeks a continuance to August 29, 1994 to try this case.

6. Additionally, defendant seeks a continuance based on pretrial publicity that has caused prejudice against the defendant on the part of the community. Pretrial publicity was in the form of an article appearing in Friday's Chicago Tribune, attached hereto as Exhibit A. The article suggests that the defendant is improperly seeking to delay his trial.

5. Along the lines of publicity on Sunday and Monday night, NBC aired its Movie of the Week, parts one and two of Deadly Matrimony, a movie concerning the real life story of the alleged contract murder of Diane Masters, by her attorney husband, Alan Masters. The untimely showing of this film prejudices the defendant on the part of the community, in that potential jurors will have a difficult time distinguishing that case from the case on trial.

7. Counsel for defendant seeks a continuance, again, based on the physical condition of her client which condition has precluded him from taking part in the preparation of his defense, because of the stress related to going through the 784 pages of discovery the State has provided to date in this case. Mr. Kagan is unable to review these materials with counsel in the manner required to prepare for trial without extreme chest pains, and the need to take medication. Mr. Kagan's treating physician has him on a medical regiment designed to increase his ability to handle stress, including the stress of trial and trial preparation.

8. This is not a case that has been on the dockets of this courthouse for an excessive or extensive period of time. Mr. Kagan was arrested less than 90 days ago, on April 28, 1994. He was arraigned on May 4, 1994. His request for a continuance is not designed to drag this case for the purpose of interfering with the administration of justice or the efficiency of this court, nor is this request designed to cause prejudice to the Prosecution in any way. The only purpose in seeking a continuance is to give Mr. Kagan the time to be able to prepare and assist in the preparation of his defense, and to give counsel the time needed to locate, interview and prepare the case based on the exculpatory evidence tendered on the day of trial, pursuant to defense motion and this Court's order.

WHEREFORE, for all of the foregoing reasons, defendant prays that his case be continued to August 29, 1994 for trial.

Respectfully submitted,

/s/ Anita Rivkin-Carothers
Attorney for Defendant

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33 North LaSalle Street
Suite 3300
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(312) 641-2901

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD KAGAN,	)	
	)	
Petitioner,	)	No. 97 CIV 8424
vs.	)	
	)	Honorable
THOMAS ROTH, Warden,	)	Wayne R. Andersen
	)	Presiding Judge
Respondent.	)	

AFFIDAVIT

Richard Kagan, being first duly sworn on oath, deposes and states as follows:

1. Your affiant was the defendant in the Lake County criminal proceedings entitled *People of the State of Illinois v. Richard Kagan*, 94 CF 795. Your affiant was represented in those proceedings by Attorney Anita Rivkin-Carothers.

2. During April 1994, I was a patient in Evanston Hospital, Evanston, Illinois, and it was medically determined that I was a suitable candidate for coronary surgery which was scheduled at the Arizona Heart Institute. My surgery was scheduled for either late April or early May 1994.

3. In May-July 1994, I was being medicated with prescribed medications which included Meclazine, a medication for the treatment of the symptoms of vertigo, dizziness, and a diuretic, also used in combination for the treatment of high blood pressure. I was still taking anti-convulsive medication and also Nitro-

stat, nitroglycerin tablets, for the control of pain related to irregular heart beat.

However, my arrest in 94 CF 795 intervened and notwithstanding several requests for judicial permission to travel for that heart surgery, I was consistently denied an opportunity to have needed coronary surgery performed prior to my July 1994 Lake County, Illinois, felony jury trial. As a result of being deprived of the oppcrtunity to have that surgery, I was only able to function by ingesting the proscribed coronary medication which included taking Procardia L-30, Lopressor, Antivert, and Nitro-Stat (as needed for pain relating to my irregular heart beat and cardiac condition) three times a day.

As a result of ingesting the prescribed medications I was, basically, a zombie. Certainly I was able to walk and talk, but I certainly was not able to in any reasonable manner facilitate or cooperate with Anita in the preparation of my felony-defense. It isn't as if she didn't make an effort—she did. However, between taking the medication needed simply to breathe, walk and talk and the escalated stress and trauma involving my ongoing divorce litigation and the criminal case, there was simply no way for me to effectively assist counsel in my criminal-case defense.

I pleaded with Ms. Carothers, throughout June and early July, 1994 to prepare and file motions, supported by the affidavits of available physicians, including Dr. Bernard Adelson, Evanston Hospital, and Dr. Howard Cohen, Cardiologist, 55 E. Washington, Chicago, Illinois, Cardiac Consultants of Chicago. Each was prepared to submit detailed affidavits regarding my need

for coronary surgery, my deteriorating physical and mental conditions as a result of taking all the medications and how there was simply no reasonable way for me to be considered competent to stand trial at that time (July 1994). Ms. Carothers filed one or two inarticulate motions, none supported by medical affidavits, requesting a continuance of the trial date. The lack of articulation regarding the absolute need for a trial adjournment contributed to trial adjournment-denial. When Ms. Carothers brought my failing mental condition to the attention of the trial judge, immediately prior to trial, she requested a B.C.Ex. (an unrecognized Cook County pseudonym where counsel seeks either a psychiatric or psychological client-examination where competency is questioned). Based on the garbled manner in which my defense attorney's request was made, the trial court basically "pooh-poohed" it—although I had been ready, willing and able to be psychologically or psychiatrically examined from late May to July, 1994. In other words, my defense attorney well-knew I lacked the capacity to cooperate in my defense based on a combination of physical and emotional difficulties, but she utterly failed to follow the prescribed method of requesting trial adjournment until a point in time where the ability to cooperate would have allowed me to play a meaningful role during the preparation and investigation stage of my case.

3. I have no clear recollection of my jury trial. Much of the time I was in a medically induced fog. I recall being carted off to the Lake County Jail after my trial. While in the Lake County Jail I was given heart medication although I do not recall what prescribed medications were made available at that jail.

4. Eventually, my family and friends agreed that I should hire an appellate lawyer. I hired Sherman Magidson and he wrote my direct appeal to the Illinois Appellate Court, Second District. In that appeal, he raised a mixed continuance/competency issue and an issue relating to the imposition of consecutive sentences. The Illinois Appellate Court affirmed my conviction but ordered the vacation of the consecutive sentence (originally I had been sentenced to a total of 42-years; the appellate court modified the sentence to 30-years). My appellate attorney petitioned the Illinois Supreme Court for review, but they declined.

5. Following the denial of review in the Illinois Supreme Court I wrote to my appellate attorney, time and again, asking that he commence Illinois post-conviction proceedings. He never did so. What he did do, was on the last day for filing a federal habeas corpus, he caused to be filed a simple petition, with no supporting memorandum or exhibits. I tried to contact him many times from approximately February 1998 to roughly August 1998 regarding the status of any of my post-conviction proceedings. He answered once in all that time. Please note that I had specifically asked him to proceed with an Illinois post-conviction petition, which he never did.

6. As a result of my original appellate lawyer's failure to file an Illinois post-conviction petition, I am now out-of-time for any such filing. I have read the response of the State of Illinois in 97 CIV 8424 (this case) and they seem to indicate that there are procedural defaults or some such thing in connection with my pending petition. I know nothing of procedural defaults, all I know is that my appellate attorney, Mr.

Magidson, had promised me that he would file my Illinois post-conviction petition and he failed to do so. After all is said and done, my family hired my present attorney who has prepared additional federal filings in an effort to make sure that I get a fundamentally fair opportunity to present my constitutional claims for conviction vacation.

Wherefore, your affiant respectfully moves that this Court grant relief pursuant to 28 U.S.C. § 2254.

Respectfully submitted,

_____

**Richard Kagan

SUBSCRIBED and SWORN
to before me this ___ day
of December, 1998.

_____

Notary Public

** This affidavit in support of petitioner's foregoing petition pursuant to 28 U.S.C. § 2254 is being filed with the Clerk of the United States District Court prior to petitioner's re-execution of this supplemental § 2254 petition. However, the accuracy of its content has heretofore been verified in telephonic conversations with the petitioner, and upon execution and return to counsel an original executed Affidavit will be substituted for this filing.